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BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of Implementation  
of Sections 11 and 13 of the Cable  
Television Consumer Protection  
and Competition Act of 1992

MM Docket No. 92-264

Horizontal and Vertical Ownership  
Limits, Cross-Ownership Limitations  
and Anti-Trafficking Provisions

**COMMENTS OF**  
**THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

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## TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY. . . . .	1
DISCUSSION. . . . .	6
I. SECTION 613(f): SUBSCRIBER LIMITS, CHANNEL OCCUPANCY LIMITS, AND LIMITS ON PARTICIPATION IN PROGRAM PRODUCTION. . . . .	6
A. Introductory Statement. . . . .	6
B. Section 613(f)(1)(A): Subscriber Limits . . . . .	13
1. How Subscriber Limits Should Be Measured . . . . .	14
2. What Is A Reasonable Subscriber Limit. . . . .	15
3. National v. Regional Limits. . . . .	18
4. Attribution Standard . . . . .	19
5. Enforcement. . . . .	21
6. Periodic Review. . . . .	23
C. Section 613(f)(1)(B): Channel Occupancy Limits. . . . .	23
1. Establishing A Reasonable Channel Occupancy Limit. . . . .	25
2. Attribution Limits . . . . .	28
3. The Status Of Broadcast, PEG And Leased Access Channels . . . . .	29
4. To Whom Should The Channel Occupancy Limits Apply . . . . .	31
5. The Effect Of Emerging Technologies. . . . .	32
6. Application Of Limits Where Effective Completion Exists. . . . .	34
7. Enforcement. . . . .	35
D. Section 613(f)(1)(C): Limits On Participation In Program Production . . . . .	36

	<u>Page</u>
II. SECTION 617: SALES OF CABLE SYSTEMS . . . . .	38
A. Transfer Of Ownership Should Be Defined as Transfers Involving a Substantial Change In Ownership . . . . .	40
B. Calculation Of The Three-Year Holding Requirement Should Commence On A Definitive Date And Should Not Be Applied On A System-By-System Basis for MSO Transfers. . . . .	43
1. Initial Construction And Acquisition . . . . .	43
2. Multiple System Operator Transfers . . . . .	44
C. The Commission Should Adopt Rules That Fully Realize the Scope Of The Exceptions To The Anti-Trafficking Rule. . . . .	46
1. Tax-Free Transfers . . . . .	46
2. Sales Required By Operation of Law . . . . .	47
3. Transfers To Affiliated Entities . . . . .	48
4. Information Requirements . . . . .	49
D. The Commission Has Broad Waiver Authority Under The Anti-Trafficking Provision. . . . .	50
E. The Commission Should Establish Specific Standards On The Information Required For Approval Of A Transfer And Should Establish Definitive Boundaries For The Commencement Of The 120-Day Period . . . . .	51
F. The Commission Should Be Responsible For Monitoring And Enforcing Compliance With The Anti-Trafficking Restriction. . . . .	53
G. The Commission Should Grandfather All Cable System Transfers That Were Pending At The Time The 1992 Cable Act Was Passed. . . . .	54
III. SECTION 613(a)(2): MMDS/SMATV CROSS-OWNERSHIP PROHIBITION. . . . .	55
A. Cross-Ownership Of Cable And MMDS Systems . . . . .	55
B. Cross-Ownership Of Cable And SMATV Systems. . . . .	57

C.	Grandfathering/Enforcement. . . . .	61
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**COMMENTS OF  
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry, representing cable television system owners and operators and cable program networks. NCTA's members also include equipment suppliers and others interested in or affiliated with the cable industry.

**INTRODUCTION AND SUMMARY**

In this proceeding, the Commission seeks comment on the interpretation and implementation of certain provisions of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. 1460 (the "1992 Act"), that deal with horizontal and vertical integration, cross-ownership, and anti-trafficking in the cable industry.

Specifically, Section 11 of the 1992 Act adds a new subsection (f) to Section 613 of the Communications Act, 47 U.S.C. §533(f), pursuant to which the Commission is required, within one year after the 1992 Act's effective date, to conduct a proceeding (A) to establish reasonable limits on the number of cable subscribers any one cable operator may serve through cable systems which it owns, or in which it has an attributable interest ("subscriber limits"); (B) to establish reasonable limits on the number of channels that can be occupied by a programmer in which a cable operator has an attributable interest ("channel occupancy limits"); and (C) to consider the necessity and appropriateness of imposing limitations on the extent to which multichannel video programming distributors may engage in the creation or production of video programming ("limits on participation in program production").<sup>1</sup> Section 11 of the 1992 Act also amends Section 613(a) of the Communications Act, 47 U.S.C. §533(a), to impose restrictions (effective December 4, 1992) on the common ownership of a cable system and a multichannel multipoint distribution service ("MMDS") facility or a satellite master antenna television service ("SMATV") facility in the cable system's franchise area.<sup>2</sup> Finally, Section 13 of the 1992 Act amends the Communications Act by adding a new Section 617, 47 U.S.C. §537, to establish (also effective

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<sup>1</sup>See H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 81-82 (1992) ("Conference Report").

<sup>2</sup>Id.

December 4, 1992) a three-year "anti-trafficking rule" and to limit the time within which a franchising authority must act to disapprove the transfer of ownership in a cable system.<sup>3</sup>

As a general matter, in implementing the provisions of Section 613 relating to horizontal ownership and vertical integration, the Commission must "strike the proper balance" among a variety of competing policy concerns and objectives. In particular, the Commission, pursuant to Congressional intent, must fully weigh the significant benefits that have accrued to consumers through horizontal concentration and vertical integration in the cable industry (and the lack of any evidence of imminent harm). And it should view the ownership provisions in the context of the various other tools that the Act provides for addressing potential anticompetitive behavior. Given these considerations, the Commission should refrain from adopting rules under Section 613 that will constrict or freeze current levels of growth or that will cause a major transformation in the marketplace.

Consistent with the foregoing, NCTA believes that subscriber limits in the range of 40% will not pose any undue risk of anticompetitive behavior. In implementing this threshold, we urge the Commission to measure subscriber limits on the basis of homes passed; to adopt only national, not regional, limits; and to establish an attribution standard based on the presence of actual control of the system's decision-making.

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<sup>3</sup>Id. at 84-85.

With regard to channel occupancy limits, NCTA urges the Commission to exercise particular caution in light of the serious constitutional concerns raised by restrictions on a cable operator's use of its channels of communication and points out that any such limits must be set at a fairly high level -- certainly much higher than the twenty percent figure cited in the NPRM -- so as not to deter continued beneficial investment by cable operators in cable networks. NCTA further suggests that, in light of the many other issues raised with respect to this provision, the most prudent course may be to defer the designation of a specific limit until these issues are resolved.

As for these other issues, given the adverse effect that channel occupancy restrictions may have on subscriber choice and diversity of programming, the Commission should adopt an attribution standard based on actual voting or working control. And in making the channel occupancy calculation, the Commission should include broadcast, PEG and leased access channels. It should exclude, however, pay-per-channel, and pay-per-program services, multiplexed services and regional programming networks.

In addition, NCTA supports the Commission's tentative conclusion that the channel occupancy limits should apply only to an operator's carriage of program networks in which that particular operator has an interest, and not to the carriage of any vertically-integrated network. We also recommend that the Commission cap the channel occupancy limits -- i.e., establish a point beyond which the channel occupancy limits would no longer

apply -- at 36 channels. And it would be appropriate to phase-out the channel occupancy limits for all cable systems that are subject to effective competition.

Concerning limits on participation in program production, NCTA believes that, in light of the various other provisions in the Act dealing with concentration and program access, there is no need for any restrictions on a cable operator's involvement in the creation or production of video programming.

In adopting "anti-trafficking" regulations, NCTA urges the Commission not to inhibit legitimate transactions but to protect against isolated instances of profiteering. In this regard, the Commission should only apply the anti-trafficking restriction to transactions involving a substantial change in ownership and should adopt a definite date for calculation of the three-year holding period with special procedures for transactions involving multiple system operators. The Commission also should exempt all transactions that fall within the broad exceptions set forth in the Act and should grandfather all transfers pending when the Act was passed.

With regard to the cross-ownership restrictions, NCTA supports the Commission's tentative conclusion that its existing cable/MMDS cross-ownership rules satisfy the statutory provision. We urge the Commission to retain its existing exceptions for rural areas and local programming and its public interest waiver standard. The cable/SMATV cross-ownership ban should be interpreted in a manner that exempts not only SMATVs that are

physically interconnected with the cable system, but also those that are being operated in accordance with the terms of the cable operator's franchise. In addition, under the statute, cable operators should be able to extend SMATV service to unserved areas in their franchise community.

Finally, NCTA strongly believes that enforcement of the national subscriber limits and channel occupancy limits, the federal anti-trafficking rule, and the cross-ownership restrictions belongs with the Commission. This will ensure uniformity and consistency in the interpretation of the rules.

#### **DISCUSSION**

#### **I. SECTION 613(f): SUBSCRIBER LIMITS, CHANNEL OCCUPANCY LIMITS, AND LIMITS ON PARTICIPATION IN PROGRAM PRODUCTION**

##### **A. Introductory Statement**

The Commission seeks comment in this proceeding on the implementation of the "subscriber limits," "channel occupancy limits," and "limits on participation in program production" provisions contained in Section 613(f) of the 1992 Act. At the outset, NCTA observes that Congress has not dictated any particular outcome with respect to the promulgation of rules pursuant to these provisions. Rather, the legislative history signals Congress' intent that, in implementing Section 613(f), the Commission has broad discretion to adopt rules that "strike the proper balance" among a variety of competing policy

concerns.<sup>4</sup> To facilitate the accomplishment of this goal, the statute sets forth a list of "public interest objectives" for the Commission to consider.<sup>5</sup>

Specifically, the Commission is directed to ensure that cable operators cannot "unfairly impede" or "unreasonably restrict" the flow of video programming from programmers to consumers or to other distributors.<sup>6</sup> At the same time, the Commission is required to take into account "any efficiencies and other benefits" that are derived from increased growth and integration in the cable industry.<sup>7</sup> The Commission also must consider the "market structure, ownership patterns, and other relationships" in the cable industry as well as the "dynamic nature of the communications marketplace."<sup>8</sup> Finally, the Commission is specifically directed to avoid prescribing rules that will "impair the development of diverse and high-quality video programming" or that will prevent cable operators from expanding service to "previously unserved rural areas."<sup>9</sup>

As is apparent from these stated objectives, the task before the Commission is to promulgate rules and regulations that take

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<sup>4</sup>S. Rep. No. 92, 102d Cong., 1st Sess. 80 (1991) ("Senate Report").

<sup>5</sup>Section 613(f)(2); 47 U.S.C. §533(f)(2).

<sup>6</sup>Section 613(f)(2)(A), (B); 47 U.S.C. §533(f)(2)(A), (B).

<sup>7</sup>Section 613(f)(2)(D); 47 U.S.C. §533(f)(2)(D).

<sup>8</sup>Section 613(f)(2)(C), (E); 47 U.S.C. §533(f)(2)(C), (E).

<sup>9</sup>Section 613(f)(2)(F), (G); 47 U.S.C. §533(f)(2)(F), (G).

into account not only the potential adverse effects of increased horizontal and vertical concentration in the cable industry, but also the potential benefits. The fact that horizontal concentration and vertical integration often have a pro-consumer impact is, of course, well-established as a matter of economic theory. More importantly, as the Commission recognized in its 1990 Cable Report, it is widely acknowledged that "horizontal concentration and vertical integration produces significant benefits" for cable subscribers.<sup>10</sup>

Some of these benefits were specifically cited in the legislative history of the 1992 Act. For example, with respect to horizontal concentration, the House Report noted that:

[t]he growth of MSOs in the cable industry has produced some efficiencies in administration, distribution, and procurement of programming. Further, programmers' transaction costs also may have been reduced in the absence of the need for negotiation with each of thousands of local cable systems throughout the country. Moreover, large MSOs, able to take risks that a small operator would not, can provide a sufficient number of subscribers to encourage new programming entry.<sup>11</sup>

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<sup>10</sup>Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service ("1990 Cable Report"), 67 RR 2d 1771, 1794 (1990) (citing views of the Department of Justice, NTIA, and the FTC).

<sup>11</sup>H.R. Rep. No. 628, 102d Cong., 2d Sess. 43 (1992) ("House Report") (emphasis added). The observations in the House Report closely track the Commission's own findings in its 1990 Cable Report:

Higher concentration levels in the cable industry have enabled companies to take advantage of valuable economies of scale and faster investment in more and better program sources, which lead to more investment in programming, more original programming and a wealth of new viewing options for consumers. Cable Report, *supra*, 67 RR 2d at 1794.

Nor are these the only benefits of increased horizontal growth. In a 1981 Report, the Commission's Office of Plans and Policy found that horizontal concentration can generate scale economies that lower costs and prices and improve cable service:

Overhead, maintenance, and installation have fixed costs that can be spread over many subscribers and different systems. A large subscriber base might make it economical to hire specialized labor and utilize specialized equipment. Among the areas of possible saving are: market research; program evaluation, procurement, and (possibly) production; billing; and legal service (including dealing with the FCC and local franchising bodies).<sup>12</sup>

Congress, the Commission, and other expert agencies also have taken note of the substantial benefits that can accrue to cable subscribers from increased vertical integration. In 1988, NTIA issued a study that found vertical integration was making possible new and improved programming services by producing financing and other efficiencies.<sup>13</sup> NTIA's conclusions were echoed both in the 1990 Cable Report, which found that vertical integration "promote[s] the introduction of new services" by providing "needy capital and a ready subscriber base",<sup>14</sup> and in the legislative history of the 1992 Act, wherein numerous examples of "innovative programming services that would not have

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<sup>12</sup>K. Gordon, J. Levey, and R. Preece, FCC Policy on Cable Ownership, 103 (1981). See also id. at 101-02 (noting that "[t]he size of an MSO may allow it . . . to obtain improved access to capital, and to have superior research and development capabilities").

<sup>13</sup>Video Program Distribution and Cable Television: Current Policy Issues and Recommendations (NTIA Report 88-233) 106 (1988).

<sup>14</sup>Cable Report, supra, 67 RR 2d at 1794.

been feasible without the financial support of cable system operators" were cited.<sup>15</sup>

Equally important as the substantial benefits that have been, and are being, produced by increased concentration in the cable industry is the fact that, to date, there is little evidence that such increased concentration is, as a structural matter, having an adverse effect on competition and diversity. For example, in its 1990 Cable Report, the Commission expressly concluded that no single MSO had the ability to preclude the launch of a new program network.<sup>16</sup> Moreover, as the Commission notes in the NRPM, applying traditional antitrust measures, the cable industry remains relatively unconcentrated.<sup>17</sup>

With respect to vertical integration, the situation is essentially the same. Notwithstanding anecdotal allegations of episodic anticompetitive behavior, there is no evidence that, as a structural matter, competition and diversity face any imminent threat from the carriage of vertically integrated program networks. For example, a 1989 study prepared for NCTA by Dr. Benjamin Klein, Professor of Economics at the University of California, specifically found no anticompetitive effects from

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<sup>15</sup>House Report at 41. Among the networks identified were C-SPAN, CNN, BET, Nickelodeon, and Discovery.

<sup>16</sup>1990 Cable Report, supra, 67 RR 2d at 1778, 1803.

<sup>17</sup>NRPM at ¶15, n. 47 (citing Four Firm Ratio and Hirschman-Hirschman index data for the cable industry). See also House Report at 42.

vertical integration in the cable industry.<sup>18</sup> Not surprisingly, the 1990 Cable Report, which cited the Klein study findings,

expressly eschewed recommending the imposition of structural limitations on vertical integration.<sup>19</sup>

In short, there can be no doubt that, as a result of horizontal concentration and vertical integration, there has been "substantial and beneficial growth in the provision of cable services" and that, in adopting regulations to address concerns regarding the potential adverse effects of increased concentration and control, the government should "tread lightly."<sup>20</sup> Increased concentration, and the efficiencies provided thereby, have had much to do with the growth and development of the cable industry in recent years and with cable's role in "changing the expectations of most Americans about television viewing options."<sup>21</sup> And these efficiencies will continue to be of crucial importance as cable looks to the 21st Century and the provision of such beneficial new services and

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<sup>18</sup>B. Klein, The Competitive Consequences of Vertical Integration in the Cable Industry (1989). A copy of the Klein study is attached hereto as Appendix A. Specifically, Dr. Klein found that there was no evidence that vertically integrated cable operators systematically exclude competing cable programming networks from being carried on their cable systems. Klein Study at 3. He also found that vertically integrated programmers were not engaging in anticompetitive conduct with respect to alternative distribution technologies. Id.

<sup>19</sup>1990 Cable Report, supra, 67 RR 2d at 1795, 1803.

<sup>20</sup>Id.

<sup>21</sup>Id. at 1775.

technologies as fiber optic cable, digital compression, interactive programming, and high definition television.

While it is true that the legislative history of Section 613 indicates that Congress intended for the Commission to adopt "some limits" on horizontal concentration and vertical integration,<sup>22</sup> the Commission is under no obligation to establish limits that will constrict, or even freeze, current levels of concentration. In this regard, and with specific reference to the Commission's obligation to "strike the proper balance" in adopting subscriber limits and channel occupancy limits, it is important to note that Section 613(f) is only one of several tools that Congress has given the Commission to deal with concerns about the potential adverse impact of vertical integration and horizontal concentration on competition and diversity in the video marketplace. For example, in Section 19 of the 1992 Act, Congress directed the FCC to adopt "program access" regulations designed to protect unaffiliated distributors in their relationships with vertically integrated program suppliers, while Section 12 requires the Commission to implement rules governing carriage agreements between unaffiliated program suppliers and multichannel distributors, including cable operators.<sup>23</sup> In addition, Section 9 of the 1992 Act requires the

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<sup>22</sup>Senate Report at 80.

<sup>23</sup>47 U.S.C. §§548, 536. See generally Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Distribution and Carriage, MM Docket No. 92-265 (rel. Dec. 24, 1992).

Commission to promulgate new rules to make the use of "leased access" channels a more desirable alternative for programmers.<sup>24</sup>

It is critically important that, in implementing Section 613(f), the Commission fully weigh the impact of these other provisions.<sup>25</sup> Indeed, NCTA submits that Congress intended for these provisions, not Section 613(f), to serve as the principal means of ensuring that the flow of diverse programming to consumers and other distribution outlets is not unreasonably restricted.<sup>26</sup> Thus, as we emphasize throughout the comments that now follow, the Commission should take the view -- and should adopt implementing rules accordingly -- that the limits required by Section 613(f) are intended to serve as safeguards against any radical transformation of the existing market structure and not as vehicles for effectuating such transformation.

**B. Section 613(f)(1)(A): Subscriber Limits**

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<sup>24</sup>47 U.S.C. §532. See generally Implementation of Rate Regulations Sections of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-266 (rel. Dec. 24, 1992).

<sup>25</sup>NCTA notes that Section 613(f) does not become effective until next October and submits that, in order to properly balance the actions taken with respect to various other provisions of the 1992 Act, it may be prudent for the Commission to "let the dust settle" before adopting final rules in this proceeding. Indeed, the Commission may wish to issue a further notice of proposed rulemaking that takes into account not only the initial comments filed herein, but also the impact of its decisions implementing other provisions of the Act.

<sup>26</sup>NCTA's citation of these provisions, several of which are currently being challenged on first amendment grounds, should in no way be construed as an endorsement of their constitutionality.

In Section 613(f)(1)(A) of the 1992 Act, Congress has directed the Commission "to prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest."<sup>27</sup> In addition to seeking comment on the issues of how, and at what level, the required subscriber limits should be set, the Commission's NPRM raises a number of other questions related to the implementation of this section. These include questions as to whether there should be regional as well as national subscriber limits; what attribution standard should be applied; how the subscriber limits should be enforced; and whether (and how often) the Commission should periodically review the subscriber limits established under Section 613(f)(1)(A).

**1. How Subscriber Limits Should Be Measured**

The NPRM asks for comment on whether subscriber limits should be determined using a subscriber-based measure or on the basis of homes passed.<sup>28</sup> NCTA submits that, as a general matter, homes passed is a more appropriate measure of a cable operator's size for purposes of this section. As the NPRM points out, a simple subscriber-based measurement may be unstable and could penalize operators for attracting additional subscribers through the provision of new programming and improved service.<sup>29</sup>

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<sup>27</sup>47 U.S.C. §533(f)(1)(A).

<sup>28</sup>NPRM at ¶36.

<sup>29</sup>Id.

While a straightforward homes passed measure is preferable to a simple subscriber-based limit, it may nonetheless overstate the actual market power possessed by a particular operator. As the NPRM suggests, where a cable operator is subject to "effective competition", there is little cause for concern about its ability to impede the flow of programming.<sup>30</sup> Thus, it may be appropriate to deduct from the number of homes passed by a particular operator those homes that are also passed by a competing distribution service.<sup>31</sup>

## **2. What Is A Reasonable Subscriber Limit**

In the NPRM, the Commission asks whether, in light of "existing market structure and ownership patterns, and the efficiencies and economies of scale resulting from horizontal relationships," a subscriber limit in the range of 25% to 35% of homes passed would be reasonable.<sup>32</sup> NCTA believes that the Commission is on the right track, but that a somewhat higher limit is more appropriate.

NCTA submits that a subscriber limit of as much as 40% of homes passed will not pose any undue risk of anticompetitive behavior. Focusing on Congress' concern that a large system could use its size to restrict the flow of programming to the public, the Commission has asked for information regarding the

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<sup>30</sup>Id. at ¶33, n. 51.

<sup>31</sup>Another alternative might be to measure an operator's size as a percentage of the number of subscribers served not just by cable systems, but by other distribution technologies as well.

<sup>32</sup>NPRM at ¶37.

level of horizontal control that would allow a single MSO to "preclude the success of a new cable service" and for examples of such conduct.<sup>33</sup> NCTA knows of no instance in which the actions of a single MSO (or, indeed, the concerted action of several

MSOs) have caused a new programming service to fail.<sup>34</sup> Nor do we believe, in light of the substantial evidence that many services have survived and flourished with penetration levels well below 60%, that an operator meeting a 40% subscriber limit could single-handedly "preclude" the success of a program service.<sup>35</sup>

The fact that many services remain in business with differing levels of penetration reflects the wide range of variables that determine a service's economic success. Different services have different economic characteristics. A service may be supported principally by subscriber fees, principally by advertising revenues, or by a combination of the two. The extent to which the system relies more heavily on one of these revenue sources than the other may influence the penetration level that it needs for success. Similarly, the nature of the programming

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<sup>33</sup>Id.

<sup>34</sup>See also 1990 Cable Report, supra, 67 RR 2d at 1778 (no evidence that "national horizontal concentration has yet provided any single MSO with the unilateral ability to preclude the successful launch of a new programming service").

<sup>35</sup>Examples of existing services that have penetration levels below 60% include BET, Country Music TV, Mind Extension University, and Nostalgia. Each of these services has been operating for at least six years.

presented by a service (e.g., original productions, recent theatrical releases, news, documentaries, sports, etc.) will have a significant impact on the service's cost structure, which will influence the level of minimum penetration needed.

In suggesting a subscriber limit in the 40% range, NCTA also relies on existing antitrust precedent and theory. As Judge Learned Hand indicated almost fifty years ago, although a ninety percent market share is certainly enough to constitute a monopoly, "it is doubtful whether sixty or sixty-four percent would be enough."<sup>36</sup> And while it may not be possible to formulate a general rule applicable to all cases, it has been observed that the leading decisions upholding monopolization claims have involved defendants who controlled well over half the market. See Broadway Delivery Corp. v. United Parcel Service of America, Inc., 651 F.2d 122, 127 (2d Cir.), cert denied, 454 U.S. 968 (1981) (citations omitted).<sup>37</sup>

Finally, in considering NCTA's proposal for a subscriber limit in the 40% range, the Commission should keep in mind the other provisions of the 1992 Act that protect against competitive abuses. As discussed above in Section IA, Section 613(f) should be viewed as creating a "safety net" that protects against precipitous changes in the existing market structure. Given the existence of provisions such as those dealing with program

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<sup>36</sup>U.S. v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945).

<sup>37</sup> See, e.g., 2 E. Kintner, Federal Antitrust Law, §12.6, at 352 (1980); I Antitrust Law Developments (Third) 213-14 (1992).

access, leased access, and regulation of carriage agreements, concern that particular operators will attempt to extract unreasonable concessions from programmers or to deny programmers access need not, and should not, be addressed by rules that constrict or freeze growth in the cable industry. Under the circumstances, a 40% subscriber limit -- which would not require any current operator to divest and would allow some measure of additional concentration (and the benefits that flow therefrom) - - is wholly appropriate.<sup>38</sup>

### 3. National v. Regional Limits

The Commission raises as an issue in this proceeding whether it should impose regional subscriber limits as well as national limits.<sup>39</sup> NCTA submits that there is no evidence that Congress was either concerned with or intended for the Commission to address the issue of regional concentration. Thus, only national limits should be imposed.

The legislative history of Section 613(f)(1)(A) indicates that, in Congress' view, the Commission had the authority to adopt both national and regional subscriber limits even before the passage of the 1992 Act.<sup>40</sup> In enacting Section 613(f)(1)(A), however, it is clear that Congress was concerned only with

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<sup>38</sup>This conclusion is supported by the 1992 Act's legislative history. As the Commission has noted, Congress did not intend for the rules adopted under Section 613 to require divestiture of any company. NRPM at ¶37, citing Senate Report at 34.

<sup>39</sup>NRPM at ¶35.

<sup>40</sup>Senate Report at 34.

national concentration. Indeed, the Senate Report expressly states that the purpose underlying the subscriber limits provision in Section 613(f)(1)(A) is "to address the issue of national concentration."<sup>41</sup>

Had Congress been at all interested in limiting regional concentration, it would have given the Commission some guidance in formulating such limits. Moreover, it should be noted that the market in which cable operators buy, and cable programmers sell, is essentially national in scope. Absent any clear indication to the contrary, the imposition of regional subscriber limits is neither required nor appropriate.

#### 4. Attribution Standard

The Commission asks for comment regarding the "appropriate standard for determining ownership of cable systems in connection with application of the subscriber limits."<sup>42</sup> Although Section 613(f)(1)(A) specifically refers to cable systems in which a person has "an attributable interest," the term "attributable interest" is not defined. As the Commission points out, however, the Senate Report suggests that, in implementing the subscriber limits provision, the Commission should use "the attribution criteria set forth in 47 CFR Section 73.3555 (notes) or other criteria as the FCC may deem appropriate."<sup>43</sup> The attribution criteria contained in 47 CFR Section 73.3555 generally treat

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<sup>41</sup>Id. (emphasis added).

<sup>42</sup>NPRM at ¶38.

<sup>43</sup>Id., citing Senate Report at 80.

ownership of 5% or more of a broadcasting company's voting stock as an attributable ownership interest for purposes of various broadcast cross-ownership and multiple ownership rules.

NCTA submits that application of the broadcast attribution standard in the context of the subscriber limits provision would be completely inappropriate. NCTA has previously addressed the issue of attribution standards under the 1992 Act in its comments in the "program access" rulemaking.<sup>44</sup> As we stated in those comments, it does not necessarily follow that the same standard should apply across the board whenever the Commission needs to define attributable ownership. What constitutes a de minimis and essentially irrelevant interest in some contexts may be different from what should be considered de minimis in other contexts.<sup>45</sup>

With respect to the establishment of subscriber limits under Section 613(f)(1)(A), the principal regulatory concern is the ability of cable operators to use their size to restrict the flow of programming to consumers. Ownership of a 5% interest in a cable system affords an investor neither the incentive nor the opportunity to exercise control over the system's dealings with programmers. Moreover, setting the attribution level

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<sup>44</sup>Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, supra MM Docket No. 92-265.

<sup>45</sup>Comments of NCTA in MM Docket No. 92-265 at 15 (filed January 25, 1993). As we noted, the attribution standard applied in the telco/cable cross-ownership differs in various respects from the broadcast attribution standard. Compare 47 CFR §63.54 with 47 CFR §73.3555.

unnecessarily low will ultimately impede infusions of capital that can provide a variety of pro-consumer benefits.

NCTA believes that a more appropriate attribution standard for purposes of the subscriber limits provision is one based on actual control of the system's decision-making. In the program access proceeding, we suggested that attribution be based on actual voting control (i.e., 50 percent ownership), or some evidence of working control (e.g., a contractual right to manage a system). A similar requirement should be adopted for purposes of Section 613(f)(1)(A).

#### 5. Enforcement

As the Commission points out, the Cable 1992 Act does not specifically provide a mechanism for monitoring and/or enforcing the subscriber limits established pursuant to Section 613(f)(1)(A).<sup>46</sup> Noting that subscriber information is publicly available from numerous sources, the Commission has tentatively decided against the imposition of any specific new reporting requirements.<sup>47</sup> However, the Commission has asked whether a certification or complaint process should be adopted to ensure compliance with the subscriber limits and, if so, how such a process should work.<sup>48</sup>

NCTA agrees with the Commission's tentative decision not to impose any new reporting requirements relating to the subscriber

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<sup>46</sup>NPRM at ¶39.

<sup>47</sup>Id.

<sup>48</sup>Id.